Admiral Merchants Motor Freight, Inc. and Automobile Mechanics Local 701, International Association of Machinists and Aerospace Workers, AFL-CIO, Case 13-CA-20679

October 19, 1982

# **DECISION AND ORDER**

# By Members Fanning, Jenkins, and Zimmerman

On March 10, 1982, Administrative Law Judge Robert A. Giannasi issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, 1 and the General Counsel filed an answering brief, cross-exceptions, and a brief in support thereof.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge, as modified below, and to adopt his recommended Order, as modified herein.

The Administrative Law Judge found that Respondent violated Section 8(a)(5) and (1) of the Act by circumventing the exclusive status of the Union as bargaining agent by attempting to deal, and dealing, directly with its represented employees regarding changes in their terms and conditions of employment as set forth in the parties' collective-bargaining agreement, and by unilaterally implementing such changes without first notifying or bargaining with the Union. The Administrative Law Judge found Respondent's defenses for such conduct to be "patently frivolous," and, in addition to the Board's traditional order requiring Respondent to cease and desist from any like or related conduct, recommended that Respondent be ordered to, inter alia, reimburse the General Counsel and the Charging Party for all expenses incurred as a result of the instant proceeding. Respondent excepts to the Administrative Law Judge's finding that its direct dealing with employees and unilateral changes are unlawful, reiterates its asserted defenses, and contends that the extreme remedial relief recommended by the Administrative Law Judge is unwarranted in this case. The General Counsel, on the other hand, urges the Board to adopt the Administrative Law Judge's 8(a)(5) and (1) violation findings and his recommended Order with respect thereto. The General Counsel contends, however, that the Administrative Law Judge erroneously refused to pass upon two asserted independent violations of Section 8(a)(1) of the Act occurring during the course of Respondent's direct dealings with its employees. While we are in agreement with the Administrative Law Judge, and, for the reasons set forth by him, find that Respondent violated Section 8(a)(5) and (1) of the Act, we do not find the recommended extraordinary relief appropriate on the facts of this case. Additionally, we find, for the reasons set forth below, that the separate 8(a)(1) violations sought by the General Counsel warrant independent consideration and remedial relief.

1. The employees at Respondent's terminal are represented for purposes of collective bargaining by the Union. The parties' most recent collectivebargaining agreement is effective through April 20, 1982. On August 29, 1980, Respondent's president and owner, Robert E. Short, in a speech to the assembled Chicago terminal employees, stated that Respondent was having economic difficulties; that Respondent had been ordered by a district court in Minnesota to make certain payments to pension and health and welfare funds created pursuant to agreements between Respondent and the Teamsters Union representing Respondent's St. Paul terminal employees; and that a "debt reduction plan" had been devised whereby the employees at the St. Paul terminal had given up some of their benefits in order to help Respondent out of its financial difficulties and pay its obligations. Short asked the Chicago employees to similarly forgo some of their benefits and stated that, if the employees did not agree to participate in the debt reduction plan, Respondent would not be able to operate and would probably close. Thereafter, Shop Foreman and Maintenance Supervisor Earl Berg<sup>2</sup> distributed letters from Respondent to all unit employees seeking their written authorization for certain enumerated reductions in their contractually established compensation and benefits for a designated 12-month period. Berg explained the debt reduction plan to all employees who had not attended the meeting, including John Plaza, who was on layoff status at the time. Berg called Plaza into the terminal, presented him with a letter describing the debt reduction plan, and told him to sign it. Berg said that all of the other employees had signed similar letters, and, according to Plaza's uncontradicted testimony,

<sup>&</sup>lt;sup>1</sup> Respondent has requested oral argument. This request is hereby denied as the record, the exceptions, and the briefs adequately present the issues and the positions of the parties.

<sup>&</sup>lt;sup>2</sup> The uncontradicted evidence establishes that Berg gave the mechanics in the shop their work assignments on a day-to-day basis, and had the authority to hire and fire employees, reprimand them for misconduct, and grant them time off. We therefore find Berg to be a supervisor within the meaning of Sec. 2(11) of the Act.

said "if I did not sign it I don't go back to work." Plaza signed the letter and about 2 weeks later was recalled.<sup>3</sup>

The Administrative Law Judge refused to pass upon whether Short's statements about closure and Berg's remarks to employee Plaza constituted independent violations of Section 8(a)(1) of the Act because, as urged by the General Counsel, they would have a tendency to coerce employees into forgoing collective-bargaining rights. The Administrative Law Judge reasoned that there were no such allegations in the complaint that any potential violation in this regard is encompassed by the derivative 8(a)(1) violation found by him and that an independent 8(a)(1) violation finding would not likely significantly alter the remedy. We disagree.

While the Administrative Law Judge is correct in stating that the statements of Short and Berg were not specifically alleged as independent violations of Section 8(a)(1) in either the complaint or the amended complaint, these issues were fully litigated at the hearing and are in accord with, and closely related to, the substance of the complaint. Further, at the close of the hearing, counsel for the General Counsel made an oral presentation during which he argued that Short's statements in question and Berg's remarks independently violated Section 8(a)(1) of the Act. Accordingly, in these circumstances, we find no basis for concluding that Respondent would in any way be prejudiced by a ruling on the merits of these additional allegations. 4

As to the merits, we find that Short's prediction of plant closure if employees did not accede to the debt reduction plan and Berg's suggestion that Plaza's recall would be predicated on his waiver of existing contractual benefits constitute threats of reprisal and therefore conduct which would have a tendency to coerce employees into abandoning their Section 7 right to bargain collectively through a representative of their own choosing. The statements of Short and Berg conveyed the clear message to the employees that failure to accede to Respondent's request to waive their contractually established benefits would result in the loss of their jobs, in the case of the employees then working, through closure of the terminal, and, in Plaza's case, by not being recalled from layoff. In

the context of the employment relationship, few statements would tend to be more threatening and thus coercive than these. Indeed, the employees' subsequent accession to the request evidences as much. Accordingly, we find that Respondent violated Section 8(a)(1) of the Act by such statements.<sup>5</sup>

In so finding, we reject the Administrative Law Judge's conclusion that the 8(a)(5) and derivative 8(a)(1) violations found by him and his recommended remedy for those violations are sufficient to reach and remedy any independent violations which might be found based on Short's and Berg's statements. The coercive statements in question are not a necessary element of the unlawful bargaining conduct of Respondent. Thus, Respondent could have omitted these statements from its conduct in bypassing the Union as the employees' representative, and it still would have violated Section 8(a)(5) and (1) of the Act. That the statements were intended to further such conduct and help Respondent to achieve the desired end of having the employees agree to a reduction in benefits does not detract from this conclusion. The statements are no less coercive or incapable of being sorted out from Respondent's other unlawful conduct merely because they were part of Respondent's derogation of the Union's statutory bargaining rights.

Further, the traditional remedy for Respondent's failure to bargain with the Union will not enjoin Respondent from coercively threatening its employees, the nub of the independent 8(a)(1) violations found herein. Accordingly, in order to adequately remedy the additional unfair labor practices, we find it appropriate and necessary to specifically order Respondent to cease and desist from threatening employees with plant closure and denial of recall from layoff status unless they indi-

<sup>&</sup>lt;sup>3</sup> We take administrative notice of the fact that concurrent unfair labor practice charges were filed against Respondent alleging that it had unlawfully engaged in direct dealings with union-represented employees at its Omaha, Nebraska, facility; sought their acquiescence in the abovementioned plan agreed to by the St. Paul employees; and pressured the Omaha employees by various means, including layoffs, until they agreed to modifications in their existing benefits.

<sup>&</sup>lt;sup>4</sup> E.g., Electri-Flex Company, 228 NLRB 847, fn. 6 (1977); Clinton Corn Processing Company, a Division of Standard Brands Incorporated, 253 NLRB 622, fn. 1 (1980). Behring International, Inc., 252 NLRB 354, 363 (1980); Pilgrim Life Insurance Company, 249 NLRB 1228, fn. 1 (1980).

<sup>&</sup>lt;sup>6</sup> See Don Brentner Trucking Co., Inc. and Jon's Leasing Co., Inc., 232 NLRB 428, 434 (1977).

Member Fanning does not agree that Respondent's statement that it would close down absent modifications of its contract constituted an independent violation of Sec. 8(a)(1). Rather, such statement was illegal only as a function of Respondent's attempts to bypass the Union and deal directly with employees. Had the statement been made to the Union in bargaining and not directly to the employees, it would not have been illegal. Member Fanning does agree, however, that the statement to Plaza did constitute a threat of reprisal in that Plaza was told that he would not be recalled unless he personally agreed to the proposed contractual modifications. Plaza had a Sec. 7 right to oppose contract modifications and his employment rights could not be conditioned upon his personal decision.

Members Jenkins and Zimmerman find it irrelevant that the statement if made to the Union alone would not be illegal. The illegality turns on the context in which the statement was uttered. Here, it was said to employees in an attempt to get their approval of contractual modifications without the participation of the Union, and in derogation of the latter's status as bargaining representative. As such, it clearly was coercive and tended to interfere with and restrain the employees in the exercise of their Sec. 7 rights.

vidually agree to modifications of their existing contractual benefits.

2. Respondent asserted before the Administrative Law Judge, as reiterated in its brief to the Board, that its direct dealings with employees and its unilateral implementation of benefit changes were compelled by the above-discussed district court order to pay off its debts to the Teamsters benefit funds and its dire economic straits. We agree with the Administrative Law Judge's analysis which led him to conclude, as do we, that Respondent's defenses have no basis for support in either fact or law. We find, however, that the extraordinary remedies recommended by the Administrative Law Judge are not appropriate on the facts of this case.

At the outset we note our adherence to the principle expressed in Tiidee Products, Inc.,6 that the Board, in appropriate circumstances, is capable of providing other than the usual remedial relief in order to rectify particular unfair labor practices. However, the extent and character of the unfair labor practices committed by Respondent do not warrant directing Respondent to reimburse the General Counsel and the Charging Party for expenses incurred as a result of litigating this proceeding. This record establishes that Respondent has a history of a collective-bargaining relationship with at least two different unions, yet there is nothing to indicate that Respondent is a repeat offender of this statute. Nor can it be found on this record that Respondent has engaged in a pattern of unlawful antiunion conduct for the purpose of denying all of its employees the exercise of the rights guaranteed employees by Section 7 of the Act.7 And, while Respondent's proffered justifications for its conduct may be specious, this is not a situation where the offending party has intentionally used defenses meritless on their face in a clear attempt to burden the processes of the Board and the courts.8 In sum, we find 8(a)(5) and (1) violations with an order requiring Respondent to cease and desist from bypassing, and refusing to bargain with, the Union, but shall delete in our Order and notice the extraordinary relief recommended by the Administrative Law Judge.

## AMENDED CONCLUSIONS OF LAW

Insert the following as paragraph 4 and renumber the subsequent paragraph accordingly:

"4. By threatening employees with closing the Chicago terminal unless they agreed to modifications of existing contractual benefits and by threatening not to recall an employee from layoff unless he agreed to modifications of existing contractual benefits, Respondent violated Section 8(a)(1) of the Act."

# **ORDER**

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Admiral Merchants Motor Freight, Inc., Chicago, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

- 1. Insert the following as paragraph 1(d) and reletter the subsequent paragraph accordingly:
- "(d) Threatening employees with closure of the Chicago terminal unless they agree to modifications of existing contractual benefits and threatening not to recall employees from layoff unless they agree to modifications of existing contractual benefits."
- 2. Substitute the following for paragraphs 2(e) and (f):
- "(e) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.
- "(f) Post at its Chicago, Illinois, facility copies of the attached notice marked 'Appendix.' Copies of said notice, on forms provided by the Regional Director for Region 13, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material."
- 3. Substitute the attached notice for that of the Administrative Law Judge.

<sup>6 194</sup> NLRB 1234, 1236 (1972).

<sup>&</sup>lt;sup>7</sup> See Heck's, Inc., 191 NLRB 886 (1971). Compare J. P. Stevens & Co., Inc., 239 NLRB 738, 772–773 (1978), enforcement denied in pertinent part 623 F.2d 322 (4th Cir. 1980), cert. denied 101 S.Ct. 856, 90 LC ¶12,552 (1981)

While Respondent unilaterally implemented benefit changes in reliance upon the debt reduction plan at more than one of its facilities, such action does not amount to the same pattern of obstruction of employees' Sec. 7 rights exhibited by employers in cases where extraordinary remedies have been imposed. Accordingly, we do not find that Respondent has displayed the requisite defiance of the Act which is necessary to warrant each remedies.

<sup>&</sup>lt;sup>8</sup> Fetzer Broadcasting Company, 227 NLRB 1377, 1389-90 (1977).

# **APPENDIX**

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT refuse to bargain collectively concerning wages, benefits, hours, and other terms and conditions of employment with Automobile Mechanics Local 701, International Association of Machinists and Aerospace Workers, AFL-CIO, as the exclusive bargaining representative of the employees in the following unit:

All head mechanics, leadmen and/or foremen, automotive machinists, mechanics, trailer mechanics, helpers, skilled tiremen, stockmen, journeymen, stockroom utility apprentices and apprentices employed by us at our facility currently located at 5504 West 47th Street, Chicago, Illinois, but excluding all other employees and guards and supervisors as defined in the Act.

WE WILL NOT bypass the Union and deal directly and individually with any of our employees in the aforesaid unit with respect to any changes or modifications in existing or contractually established wages, benefits, hours, and other terms and conditions of employment.

WE WILL NOT refuse to bargain collectively with the above labor organization by unilaterally and without consultation with, or prior notification to, such labor organization, changing or modifying existing or contractually established wages, benefits, hours, and other terms and conditions of employment of employees in the aforesaid unit.

WE WILL NOT threaten employees that we will close the Chicago terminal unless they agree to modifications of existing contractual benefits.

WE WILL NOT threaten employees that we will not recall them from layoff unless they agree to modifications of existing contractual benefits.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain collectively with the Union as the exclusive bargaining representative of our employees in the appropriate unit with respect to wages, hours, and other terms and conditions of employment.

WE WILL notify, meet, and bargain with the Union before modifying, changing or eliminating any existing or contractual benefits of employees in the appropriate unit.

WE WILL reinstate the contractual benefits of employees in the appropriate unit in the manner, form, and amounts which existed prior to September 1, 1980, consistent with the collective-bargaining agreement between us and the Union.

WE WILL make whole employees for any loss of wages and other benefits they may have suffered as a result of the unlawful modification of contractual benefits to which they were entitled, with interest.

ADMIRAL MERCHANTS MOTOR FREIGHT, INC.

# **DECISION**

# STATEMENT OF THE CASE

ROBERT A. GIANNASI, Administrative Law Judge: This case was heard on September 3, 1981, in Chicago, Illinois. The complaint alleges that Respondent violated Section 8(a)(5) and (1) of the Act by failing to notify and bargain with the Charging Party Union and dealing directly with employees in modifying existing benefits set forth in a collective-bargaining agreement of the parties. Respondent, in its answer, denies the substantive allegations of the complaint. The General Counsel made an oral presentation at the conclusion of the hearing and Respondent thereafter filed a written brief.

Based upon the entire record in this case, including the testimony of the witnesses and my observation of their demeanor, I make the following:

# FINDINGS OF FACT

# I. THE BUSINESS OF RESPONDENT

At all times material, Respondent, a Minnesota corporation, was engaged in the business of interstate trucking. It maintained its principal office in St. Paul, Minnesota, and maintained terminals in about nine States, including one located at 5504 West 47th Street in Chicago, Illinois, the site of the instant dispute. During a representative 1-year period, Respondent derived gross revenues in excess of \$50,000 from the transportation of freight and commodities from the State of Illinois directly to points outside Illinois and performed services valued in excess of \$50,000 which were performed outside of Illinois. Accordingly, I find, as Respondent admits, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

## II. THE LABOR ORGANIZATION

The Charging Party Union (hereafter the Union) is a labor organization within the meaning of Section 2(5) of the Act.

## III. THE UNFAIR LABOR PRACTICES

#### A. The Facts

Since about 1955, Respondent and the Union have been parties to successive collective-bargaining agreements, the most recent of which is effective through April 30, 1982. Respondent recognizes the Union as the exclusive bargaining representative for the following unit of employees:

All head mechanics, leadmen and/or foremen, automotive machinists, mechanics, trailer mechanics, helpers, skilled tiremen, stockmen, journeymen, stockroom utility apprentices and apprentices employed by Respondent at its facility currently located at 5504 West 47th Street, Chicago, Illinois, but excluding all other employees and guards and supervisors as defined in the Act.

The bargaining agreement of the parties is a typical one which covers a wide range of benefits, wages, hours, and terms and conditions of employment.

On August 29, 1980, Robert E. Short, the president and owner of Respondent, visited the Chicago terminal and gave a speech to assembled employees. No representatives of the Union were present. Short told the employees that Respondent was having economic difficulties. He also explained that a Federal district court in Minnesota had ordered Respondent to make certain payments it owed to pension and welfare funds created pursuant to agreements between Respondent and the Teamsters representing other of its employees. He explained that a so-called debt reduction plan had been devised whereby employees at the St. Paul terminal had given up some of their benefits in order to help Respondent pay its obligations and help it out of its financial difficulties. He asked the Chicago employees similarly to forgo some of their benefits and stated that if the employees did not agree to this debt reduction plan, Respondent would not be able to operate and would probably close.

After the speech, letters describing Respondent's debt reduction plan were distributed to employees. The letter written by Respondent was to be signed by employees who agreed to "changes in [their] terms of compensation . . . ." The letters read as follows:

As a concerned . . . employee of Admiral Merchants Motor Freight, Inc., who is interested in the continuing operation of the trucking company, I hereby offer that you make the following changes in my compensation during the twelve (12) month period beginning September 1, 1980 and ending August 31, 1981:

- (1) No paid holidays during the period involved.
- (2) No paid sick days during the period involved.

- (3) Reduction of paid vacation pay to two (2) weeks.
- (4) Reduction of gross weekly wages by the combined amount of the weekly Health, Welfare and Pension contribution to the Labor funds.
- (5) Road drivers to be paid mileage or hourly pay only, which ever is applicable.
- (6) No Contract wage increase during the period involved.
  - (7) No overtime pay during the period involved.

It is understood that the continued Operation of Admiral Merchants Motor Freight, Inc. will be reviewed from time to time to make certain that Management is successfully re-organizing the carrier.

The letters were distributed to the bargaining unit employees by Shop Foreman Earl Berg and signed by all of them within a day or two after the speech. When Berg distributed the letters to employees who had not attended the Short speech, he explained the debt reduction plan to them. According to Berg, no one objected to signing the letter. However, employee John Plaza testified that he was at home on layoff status when the August 29 speech was given. In early September he was called at home by Shop Foreman Berg and told to report to the terminal. He did. Berg presented him with the letter incorporating the debt reduction plan and was told to sign it. Berg said that all the other employees had signed similar letters. Berg also told him that "if I didn't sign it I don't go back to work." Plaza signed the letter. About 2 weeks later he was recalled from layoff status and worked continuously until the second week in January 1981.1

It was stipulated that the changes set forth in the letters distributed to and signed by employees were put into effect and continued in effect until January or February 1981 when Respondent ceased active operations at its Chicago terminal. The employees did not receive a wage increase which was due under the collective-bargaining agreement on November 1, 1980.

At no time between January 1, 1980, and January 1, 1981, did Respondent ever request bargaining or actually bargain with the Union over modifications of the collective-bargaining agreement with respect to wage increases, overtime or holiday pay, vacation time or days off, or contributions to health, welfare, or pension funds. Nor did Respondent notify the Union of proposed or actual changes in employee benefits.

Sometime in mid-September 1980, Union President Donald Gustafson instructed Business Representative Smith to go to the Chicago terminal and investigate a report that the collective-bargaining agreement was being violated. As a result of the investigation, on September 17, officials of the Union sent the following letter to Respondent:

It has been brought to our attention that management representatives of your company have recently been attempting to convince Local 701 members

<sup>&</sup>lt;sup>1</sup> Berg did not controvert Plaza's testimony in this respect.

employed as mechanics of Admiral Merchants to work under lesser conditions and benefits than those specified in the current labor agreement.

I caution you that such action constitutes an unfair labor practice and further advise that Local 701 expects your company to fully comply with the terms specified in the current labor agreement.

The letter was signed by Gustafson and Smith. Respondent did not respond to this letter.

A day or two before the letter was sent, Smith visited the Chicago terminal and spoke with Berg and two other employees. At this time the letters had already been signed by the employees and Smith learned about Respondent's difficulties and the alteration in employee benefits. According to Smith, the meeting lasted 15 minutes. Both Berg and Smith testified that Smith protested that Respondent's debt reduction plan was not in compliance with the collective-bargaining agreement. Berg could not recall this conversation in any meaningful detail, although he remembered telling Smith "a half of a loaf of bread [is] better than none." Smith was pressed by leading questions on cross-examination to admit that he gave tacit approval to the plan. He denied approving the plan, although he candidly stated that, in response to a question from an employee about what he would do if the company he worked for was going "down the drain," he may have said it was up to the employee as to what he should do in the circumstances. Smith, however, emphatically denied that he told Berg or any official of Respondent that it was free to make changes in the contract. Any suggestion by Respondent that Smith approved, after the fact, Respondent's changes in working conditions and benefits of employees is completely unfounded.

# B. Discussion and Analysis

Sections 8(a)(5) and 8(d) of the Act create an obligation on the part of an employer to bargain with an incumbent union as the exclusive bargaining representative of its employees in the matter of wages, hours, and terms and conditions of employment. It may not attempt to circumvent the exclusive status of the bargaining agent by attempting to deal directly with its represented employees. Medo Photo Supply Corp. v. N.L.R.B., 321 U.S. 678, 684-685 (1944). And where a valid bargaining relationship is in effect, an employer may not unilaterally alter terms and conditions of employment without first affording the bargaining representative of its employees the opportunity to bargain about such changes until either agreement or impasse is reached. N.L.R.B. v. Benne Katz, et al., d/b/a Williamsburg Steel Products Company, 369 U.S. 736, 747-748 (1962); Harold Hinson d/b/a Hen House Market No. 3 v. N.L.R.B., 428 F.2d 133, 136-137 (8th Cir. 1970).

The evidence is clear that Respondent undertook to deal individually with employees, and actually dealt with them, by securing signed agreements from them in order to obtain a diminution in their existing benefits secured by contract. The evidence shows that it even coerced one employee to agree to a decrease in benefits by threatening that he would not be recalled to work if he

did not agree. The changes were thereafter implemented. At no time before the implementation of benefit changes did Respondent notify the Union or seek to bargain with it over the changes. Nor does Respondent even claim it did. The Union did not acquiesce in Respondent's conduct. Accordingly, by its failure to notify and bargain with the Union in such circumstances, Respondent violated Section 8(a)(5) and (1) of the Act.<sup>2</sup>

Respondent's defense for such a clear violation of the Labor Act is that its conduct was compelled by a district court "order" to pay off a debt it owed to a pension and health and welfare fund created pursuant to a bargaining agreement between Respondent and another union and that the order required the Chicago employees represented by the Union to participate in the payment along with Respondent. This contention, clothed in a mish-mash of legal jargon, borders on the ridiculous.

Here are the facts of the Minnesota district court proceeding. Trustees of a Teamsters pension fund and a health and welfare fund sued Respondent in the United States District Court in Minneapolis, Minnesota, for delinquent payments required under Respondent's collective-bargaining agreement with the Teamsters. On August 7, 1980, the court issued a decision in which it granted summary judgment in favor of the Teamsters pension fund against Respondent in the amount of \$576,251.99 and in favor of the Teamsters health and welfare fund and against Respondent in the amount of \$380,920.79. The court also enjoined Respondent from failing to pay all moneys due the employee benefit funds under existing agreements. Judgment was entered on August 14, 1980. The judgment of the district court was affirmed by the United States Court of Appeals for the Eighth Circuit. Subsequently, on April 8, 1981, the parties to the district court action—the Teamsters funds and Respondent-entered into an agreement for a settlement of the original claims because of the initiation of involuntary bankruptcy proceedings against Respondent and the institution of judicial compliance and debt reduction plans by Respondent in order to comply with the district court's judgment. The district court, in effect, accepted the settlement and dismissed the proceedings without prejudice on May 18, 1981.

Respondent argues that all of its employees, including the Chicago mechanics represented by the Union, were bound by the district court order of August 7, 1980, and that operation of that judgment excused it from bargaining with the Union. The argument is preposterous. The district court's order states that "defendant Admiral Merchants Motor Freight, Inc., acting through its directors, officers, agents, servants, employees, shareholders, and all persons acting in privity or in concert with defendant, is enjoined from failing to pay all monies due" the Team-

<sup>&</sup>lt;sup>2</sup> In his oral presentation, but not in his proposed order and notice, the General Counsel argues that Short's speech of August 29 and Berg's remarks to employee Plaza constitute an independent violation of Sec. 8(a)(1) of the Act because they tended to coerce employees into forgoing collective rights. I do not make such a finding because there was no such allegation in the complaint and the derivative violation of Sec. 8(a)(1) encompassed by my findings sufficiently reaches this conduct. It is unlikely that the remedy for such an independent violation would be significantly different than that ordered herein.

sters funds. (Emphasis supplied.) The injunction runs against Respondent and all persons acting on its behalf. In no way could employees with no connection to Respondent's corporate management or the underlying lawsuit be held to be required to pay the corporation's judgments. Nothing in the judgment of the district court required Respondent to extract from its employees the money required to pay the judgment. Nor does the court's subsequent approval of Respondent's so-called judicial compliance or debt reduction plan constitute either a confirmation that innocent employees were bound by the judgment or a sanction of the means by which Respondent went about getting employees to satisfy its obligation.

Even apart from its inherent lack of merit, Respondent's argument that the Chicago employees were bound by the district court's judgment against Respondent misses the point. In order for Respondent's argument to provide a successful defense to the unfair labor practice herein, one would have to conclude that the district court both had the authority to, and actually did, order Respondent to bypass the bargaining representative of employees completely unconnected with the suit and to extract payment for the judgment from those employees. Clearly the court had no such authority. It did not purport to pass on the bargaining obligation of Respondent with respect to a wholly different group of employees nor make any finding concerning the bargaining obligation of Respondent under the Labor Act. Nor does the order of the district court in any way require Respondent to avoid bargaining with the exclusive bargaining representative of the Chicago mechanics and deal directly with these employees in modifying an applicable bargaining agreement. Indeed, the order of the district court did not specify how or by what means Respondent should pay the judgment or comply with the order. Respondent's contention that it was incumbent upon the employees and the Union to enter an appearance in district court and argue that it was not bound by the judgment is specious. Since the judgment of the district court did not suspend Respondent's bargaining obligation under the Labor Act, there was no requirement that the Union or the employees do anything to protect their

Respondent also points to its dire economic condition in arguing that it was justified in acting unilaterally. This again is wholly without merit. It is exactly at such times when employees need their bargaining agent the most. For example, even where an employer properly ceases or closes operations, it is required to bargain over the effects of such cessation or closure. See First National Maintenance Corp. v. N.L.R.B., 452 U.S. 666 (1981). Respondent was not going out of business in August 1980. It was seeking to continue operating and was seeking to do so by altering the contract and extracting from individual employees concessions to help pay money which it owed to another group of employees. The violation is clear notwithstanding the alleged dire economic circumstances which Respondent argues entitle it unilaterally to suspend the employees' right to speak through their chosen and exclusive bargaining representative. See also Airport Limousine Service, Inc., et al., 231 NLRB 932, 934 (1977).

## CONCLUSIONS OF LAW

 The Union is the exclusive bargaining representative of the following appropriate unit of employees:

All head mechanics, leadmen and/or foremen, automotive machinists, mechanics, trailer mechanics, helpers, skilled tiremen, stockmen, journeymen, stockroom utility apprentices and apprentices employed by Respondent at its facility currently located at 5504 West 47th Street, Chicago, Illinois, but excluding all other employees and guards and supervisors as defined in the Act.

- 2. By modifying and otherwise changing existing and contractually established wages, benefits, hours, and terms and conditions of its employees in the unit set forth above, unilaterally and without prior notice to, or consultation with, the Union, Respondent violated Section 8(a)(5) and (1) of the Act.
- 3. By disregarding and bypassing the Union and bargaining and dealing with its employees over modifications and changes in their established wages, benefits, hours, and terms and conditions of employment, Respondent violated Section 8(a)(5) and (1) of the Act.
- 4. The above violations constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

## THE REMEDY

Having found that Respondent violated Section 8(a)(5) and (1) of the Act, I shall order it to cease and desist from the conduct found to be unlawful. I shall also order it to undertake affirmative action which will effectuate the policies of the Act, that is, to bargain collectively with the Union, to apply the collective-bargaining agreement to its employees and to make them whole for any loss of pay or other benefits they may have suffered by reason of Respondent's unlawful conduct. Such losses shall be reimbursed, with interest, in accordance with *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962); F. W. Woolworth Company, 90 NLRB 289 (1950); and Florida Steel Corporation, 231 NLRB 651 (1977).

In addition, I believe that Respondent's defense in this case was patently frivolous. There were no factual issues in the case and the basic "legal" defense advanced by Respondent is absurd. There is no basis in fact or in law or in commonsense for Respondent's argument that the district court suspended its bargaining obligation under the Labor Act and permitted direct dealing with employees. Indeed, the argument is so lacking in substance that it could not have been made in good faith. The same is true with respect to Respondent's argument that its economic situation justified unilateral action.

Congress has expressed its view that Government ought not proceed against certain respondents in frivolous cases and has thus created machinery for recovery of litigation expenses against the Government in such cases. (Equal Access to Justice Act, Public Law 96-481,

94 Stat. 2325 (October 21, 1980).) Respondents likewise should not be permitted to make a mockery of the administrative process by interposing frivolous roadblocks to the enforcement of public rights. The Board and the Courts have recognized the Board's authority to tax a respondent for litigation expenses in cases where a respondent's defenses are "patently frivolous." See J. P. Stevens & Co., Inc., 239 NLRB 738, 772 (1978), enfd. in part and modified and remanded in part 623 F. 2d 322, 328-330 (1980); District 65, Distributive Workers of America v. N.L.R.B., 593 F.2d 1155, 1167-70 (D.C. Cir. 1978) (Bazelon, J., concurring and dissenting). This is such a case. Accordingly, I shall recommend that Respondent be ordered to reimburse the General Counsel and the Charging Party for all the expenses incurred by them in the investigation, preparation, presentation and conduct of this case "including the following costs and expenses incurred in . . . the Board . . . proceedings, reasonable counsel fees, salaries, witness fees, transcript . . . costs, printing costs, travel expenses and other reasonable costs and expenses." J. P. Stevens, supra, 239 NLRB at 773.

Upon the foregoing findings of fact and conclusions of law, upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

## ORDER<sup>3</sup>

The Respondent, Admiral Merchants Motor Freight, Inc., Chicago, Illinois, its officers, agents, successors, and assigns, shall:

- 1. Cease and desist from:
- (a) Refusing to bargain collectively concerning wages, benefits, hours, and other terms and conditions of employment with Automobile Mechanics Local 701, International Association of Machinists and Aerospace Workers, AFL-CIO, as the exclusive bargaining representative in the following unit:

All head mechanics, leadmen and/or foremen, automotive machinists, mechanics, trailer mechanics, helpers, skilled tiremen, stockmen, journeymen, stockroom utility apprentices and apprentices employed by Respondent at its facility currently located at 5504 West 47th Street, Chicago, Illinois, but excluding all other employees and guards and supervisors as defined in the Act.

(b) Bypassing the Union and dealing directly and individually with any of its employees in the aforesaid unit

- with respect to any changes or modifications in existing or contractually established wages, benefits, hours, and other terms and conditions of employment.
- (c) Refusing to bargain collectively with the above labor organization by unilaterally and without consultation with, or prior notification to, such labor organization, changing or modifying existing or contractually established wages, benefits, hours, and other terms and conditions of employment of employees in the aforesaid unit.
- (d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights set forth in Section 7 of the Act.
- 2. Take the following affirmative action which will effectuate the policies of the Act:
- (a) Upon request, bargain collectively with the Union as the exclusive bargaining representative of its employees in the appropriate unit with respect to wages, hours, and other terms and conditions of employment.
- (b) Notify, meet, and bargain with the Union before modifying, changing, or eliminating any existing or contractual benefits of employees in the appropriate unit.
- (c) Reinstate the contractual benefits of employees in the appropriate unit in the manner, form, and amounts which existed prior to September 1, 1980, consistent with the collective-bargaining agreement between it and the Union
- (d) Make whole any employees for any loss of wages and other benefits they may have suffered as a result of the unlawful modification of contractual benefits to which they were entitled, with interest, as set forth in the remedy section of this Decision.
- (e) Pay to the Board and the Union the reasonable costs and expenses incurred by them in the investigation, preparation, presentation, and conduct of this proceeding, as set forth in the remedy section of this Decision.
- (f) Post in conspicuous places at Respondent's Chicago, Illinois, facility, including all places where notices to employees are customarily posted, for a period of 60 consecutive days, copies of the attached notice marked "Appendix." Copies of said notice, on forms provided by the Regional Director for Region 13, shall be signed by Respondent's authorized representative and Respondent shall take reasonable steps to ensure that said notices are not altered, defaced, or covered by any other material.
- (g) Notify the Regional Director for Region 13, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

<sup>&</sup>lt;sup>3</sup> In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

<sup>&</sup>lt;sup>4</sup> In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."